Office Supreme Court, U.S.
FILED
SEP 29 1983
ALEXANDER L. STEVAS,

No. 82-2120.

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

THOMAS F. SMITH, JR., ET AL.,
PETITIONERS,

v.

WILLIAM P. ROBINSON, JR., ET AL.,
RESPONDENTS.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Attorney's fees are not awardable in actions brought essentially under the Education for All Handicapped Children Act (20 U.S.C. §§ 1401 *et seq.*) simply because a plaintiff also purports to allege a due process and equal protection claim or claims under the Rehabilitation Act of 1973.

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STATUTES.

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Fourteenth Amendment 3, 6
20 U.S.C. §§ 1401 et seq. 2
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MISCELLANEOUS.

Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Statutory Grounds, 130 U. Pa. L. Rev. 488 (1981) 5
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Travel and Facts of the Case.

The travel and facts of the case are adequately stated in petitioners' brief.

Reasons for Denying the Writ.

I. Attorney's Fees are Not Awardable in This Case.

In this case petitioners have conceded that the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401 *et seq.* (the "EAHCA") by its own terms does not provide for attorney's fees. They also concede that they have never argued, and that they are not now arguing, that the EAHCA is itself covered by the "and the laws" provision of 42 U.S.C. § 1983 (Petitioners' Brief, n. 3). Petitioners' sole contention is that in their complaint they included a count alleging a violation of their right to due process and equal protection. They concede that the courts below never addressed these supposed constitutional issues. In *Paul Rollinson* v. *Carrol W. Biggs*, C.A. No. 80-165, a case similar to the case at bar, where constitutional claims were alleged in an EAHCA action, but never addressed, the District Court for the District of Delaware wrote on the question of attorney fees as follows:

> The constitutional grounds asserted by the plaintiffs pose more significant problems. Initially it must be recognized that a court "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1941) (Brandis, J., concurring). Consequently, the plaintiffs must only show that they have presented a "substantial" constitutional claim. They need not demonstrate that they prevailed on the substance of the claim. *Maher* v. *Gagne*, 448 U.S. 122, 132 (1980); cf. *Hagans* v. *Lavine*, 415 U.S. 528, 537-38 (1974) (a "substantial" claim for purposes of federal jurisdiction is one which is not ines-

capably frivolous under previous decisions). From this twilight zone of uncertainty, the Court is thrust into a virtual fantasy world because the litigation settled before any disposition of the merits. The Court, therefore, finds itself in the absurd position of considering the constitutional claims in the surreal milieu of a motion for attorney's fees for claims that were neither fully developed nor considered by this Court in a decision on the merits.

Plaintiffs raise two distinct constitutional claims: first, that defendants have violated the equal protection clause of the Fourteenth Amendment by denying Kyle a free appropriate education; and second, that the defendants have violated the due process clause of the Fourteenth Amendment by failing to utilize an impartial review officer. Under the *Hagans* test, at least the equal protection claim would support a finding of "substantiality" sufficient to support federal question jurisdiction. In such a situation the Supreme Court, in quoting the legislative history of section 1988 stated:

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'

Maher v. *Gagne*, 448 U.S. at 132-33 n.15 (quoting H.R. Rep. No. 94-1558, p.4, n.7 (1976) citations omitted).

A strong argument may be made that *Maher* dictates only two results: first, that the district court consider the

merits of the constitutional claim to determine if the plaintiff would have prevailed and thereby be entitled to attorney's fees; or second, in the exercise of discretion, the district court may decline to consider the constitutional claim but must award fees. This interpretation, however, appears directly contradictory to the statutorily required finding that the party prevailed on a claim in order to justify the award of fees under section 1988. The "substantiality" test fails to provide an adequate basis for analysis because it is not difficult to construct a scenario where a constitutional claim may be substantial enough to support jurisdiction yet may not support judgment in favor of the plaintiff. In fact, the equal protection claim in this case may well represent such a situation. Nonetheless, in this context, disposition of a motion for attorney's fees in a case where there has been neither development nor adjudication of the constitutional claims, I feel it inappropriate and therefore decline to undertake such an analysis of the merits of the constitutional claim.

In the current context, therefore, attorney's fees are not available for a constitutional claim brought pursuant to section 1983 when the plaintiffs seek no more than the EAHCA grants.

As the First Circuit Court of Appeals stated in the case at bar, *Smith* v. *Cumberland School Committee*, 703 F.2d 4, 8-9 (1st Cir. 1983):

> The constitutional claims alleged here, a denial of due process and a denial of a free appropriate public education to Thomas because of his handicap, are factually identical to the EAHCA claims. Indeed, in enacting the EAHCA Congress sought to ensure that handicapped

children receive the very "rights" that plaintiffs claimed were constitutional under section 1983. *See* S. Rep. No. 168, 94th Cong., 1st Sess. 6-7, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1430-31 (legislation said to be designed to enable states to fulfill their constitutional obligations to handicapped children). Thus, the only difference between the statutory and constitutional claims is that the former carries with it a far more favorable legal standard for the plaintiffs and enabled them to prevail on what would otherwise have been fairly questionable claims. Because Congress, in providing statutory remedies for the same factual complaints, did not authorize attorneys' fees for such actions, we do not believe that section 1988 is a sufficient basis for the granting of attorneys' fees here. Plaintiffs' mere recitation of a section 1983 claim cannot create a right to attorneys' fees in litigation as to which Congress, perhaps recognizing the shortness of school funds, has not seen fit to make a special award. *Cf. Scruggs* v. *Campbell*, 630 F.2d 237 (4th Cir. 1980) (plaintiffs cannot evade EAHCA's exhaustion requirements merely be reciting section 1983 in their complaint). If this were not so, attorneys' fees would become available in almost every case by the mere incantation of section 1983. *See Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Statutory Grounds*, 130 U.Pa.L.Rev. 488, 518 (1981).

In sum the incantation of the words "due process and equal protection" followed by an invocation of "42 U.S.C. § 1983 and 42 U.S.C. § 1988" should not be allowed to transmogrify a non-fee case into a fee case. If Congress had wished the statutes of the United States to provide fees in such cases it would have done so.

Furthermore, assuming, *arguendo*, that plaintiffs had constitutional claims, the specific vehicle which Congress provided to vindicate these claims, the EAHCA, does not provide for fees. By the standard principles of statutory construction a specific statute such as the EAHCA should control over the more general terms of 42 U.S.C. §§ 1983 and 1988, *e.g.*, *Green* v. *Burns*, 433 F. Supp. 219 (D. R.I. 1977). The fact that the EAHCA was enacted under the spending clause, rather than as a 14th Amendment enforcement measure (*Board of Education* v. *Rowley*, ____ U.S. ____, 102 S.Ct. 3034 (1982)) does not change this fact.

II. The Rehabilitation Act is Not Applicable to This Case.

The Rehabilitation Act of 1973 and its provision for attorney's fees is not applicable to this case. As the First Circuit said in the case at bar (*Smith* v. *Cumberland*, *supra*):

> We reach this conclusion for substantially the same reasons that we reject an attorneys' fees award under section 1988. Section 504 of the Rehabilitation Act is a general prohibition of discrimination against otherwise qualified handicapped individuals in federally funded programs. It does not specifically apply to the education of handicapped children. The EAHCA, in contrast, is a comprehensive act specifically providing substantive and procedural rights for handicapped children denied an appropriate public education. While the more specific rights created by the EAHCA may not indicate a congressional intent to preclude "overlapping" actions under section 504, the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the

> fees provision of the more general Rehabilitation Act. *See* page 8, *supra*. This result is particularly appropriate where the very existence of a private right of action under section 504 is the subject of doubt. *But see Department of Education* v. *Katherine D.*, 531 F. Supp. 517 [D. Hawaii 1982]; *Mattie T.* v. *Holladay*, 522 F. Supp. 72 (N.D. Miss. 1981); *Campbell* v. *Talladega County Board of Education*, 518 F. Supp. 47 (N.D. Ala. 1981); *Tatro* v. *Texas*, 516 F. Supp. 968 [N.D. Tex. 1981].

703 F.2d at 9-10.

Once again we are back to the original premise. If Congress had intended fees to be awardable under the EAHCA, it would have provided for them. It has not done so and so such fees are not awardable by a verbal invocation of the Rehabilitation Act.

Conclusion.

The decision of the Court of Appeals in the above-entitled matter should be affirmed and the petition for certiorari should be dismissed.

Respectfully submitted,

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